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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

MARK ANTHONY GONZABA,
PETITIONER

VS.

THE STATE OF TEXAS,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, SIXTH DISTRICT OF TEXAS TEXARKANA, TEXAS

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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COUNSEL OF RECORD

13 pp

QUESTION PRESENTED

(1) Did the Texas Court of Appeals err in failing to hold that a prosecutor may not draw a negative inference from Petitioner's refusal to cooperate with the arresting officer and identify the source of his narcotics?

LIST OF PARTIES

Mark Anthony Gonzaba, Appellant below and Petitioner herein.

The State of Texas, Appellee below and Respondent herein.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Mark Anthony Gonzaba, respectfully prays that a writ of certiorari to review the judgment and opinion of the Court of Appeals, Sixth District of Texas, Texarkana, Texas, entered in the above entitled proceeding on February 16, 1996.

OPINION BELOW

The opinion of the Court of Appeals, Sixth District of Texas, Texarkana, Texas is unpublished. A copy of the opinion appears in the appendix. No motion for rehearing was filed, but Petitioner timely filed a petition for discretionary review in the Texas Court of Criminal Appeals. That court denied discretionary review on August 28, 1996.

JURISDICTION

The Court of Appeals, Sixth District of Texas, Texarkana, Texas, rendered an opinion affirming Petitioner's conviction on February 16, 1996. Petitioner timely filed a petition for discretionary review in the Texas Court of Criminal Appeals, which denied the petition on August 28, 1996. Jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. 1257 (a) and SUP. CT. R. 13.1.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Mark Anthony Gonzaba was convicted of delivery of a controlled substance in the Criminal District Court of Dallas County, the Honorable Don Lane, Visiting Judge, Presiding in cause no. F94-01404-H. Punishment was assessed at five years confinement. During the trial Texas Department of Public Safety Sergeant David Eldridge, the case agent, testified that it was his desire during investigations to try to follow small volume dealers of cocaine up the chain of distribution to snare larger dealers. Eldridge purchased cocaine from Petitioner, but Petitioner declined his offer to cooperate and name the source for his contraband.

During cross-examination of Petitioner, the State asked him if he had a chance to help Eldridge. (R.II 187). Petitioner objected and a hearing was held outside the presence of the jury. Once outside the presence of the jury, the State elicited testimony that Petitioner was contacted through his attorney to cooperate and did not do so. (R.II 188). Petitioner objected that this was an attempt to show mitigation or compromise of the case and was highly improper. (Id.). The trial court indicated that it would overrule the objection and force Petitioner to answer that question. (Id).

Back before the jury, the State was permitted to ask Petitioner if he agreed to cooperate with Eldridge immediately after his arrest. Petitioner replied that he did not so agree (R.II 191). Later, after a continuing objection was overruled, Sergeant Eldridge testified that he contacted defense counsel after the arrest about cooperation, but never heard back. (R.II 194).

REASONS FOR GRANTING THE PETITION

THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT NEGATIVE INFERENCES FROM PETITIONER'S REFUSAL TO COOPERATE WITH THE ARRESTING OFFICER BY REVEALING HIS SOURCE VIOLATED PETITIONER'S RIGHT AGAINST SELF INCRIMINATION AND RIGHT TO DUE PROCESS OF LAW.

The State was permitted in this case to argue that Petitioner's sentence should be increased because he was less worthy of leniency as he refused to cooperate with the arresting officer and reveal the source of his supply of contraband. Petitioner raised this point of error in the court of appeals, but was rebuffed as the court held that he had failed to preserve the point by proper objection.

This was a misreading of the record. When the complained of evidence was educed, Petitioner requested a hearing outside the presence of the jury and articulated his objection before the court, that such evidence was improper as consisting of offers to settle or compromise the case. The trial court understood the nature of Petitioner's objection, as is evident from the record.

Had the court of appeals ruled correctly on preservation of the error, it would necessarily be required to hold such evidence inadmissible under Tex. R. Crim. Evid. 410 (3) the counterpart to the same federal rule.

More than violating a state evidentiary rule, however, admission of such evidence violates a defendant's right against self-incrimination and right to due process. A number of federal cases have recognized that Federal Rule of Evidence 410 has a constitutional dimension. *Wood v. United States*, 128 F.2d 265 (D.C. Cir. 1942) (admission of withdrawn plea would be form of self-incrimination); *United States ex. rel. Spears v. Rundle*, 268 F.2d 691, 698-700 (E.D. Pa. 1967) (plea of guilty carries implied waiver of Fifth Amendment privilege: when plea is withdrawn so is implied waiver); *United States v. Albano*, 414 F.Supp. 67, 69 (S.D.

N.Y. 1976) (defendant wrote letter to trial court respecting charges against him; court refused to accept plea and further held that letter would not be admissible at trial, following *Rundle*).

Dissenting in *Hamilton v. California*, 389 U.S. 921, 88 S.Ct. 243,244 (1967), Justice Fortas stated:

> The general rule is that such evidence (plea negotiation) would not be admissible in a civil suit, even where the stake is as little as a few dollars. We should at least consider the bearing of the practice upon the constitutional guarantee of a fair trial where the issue is murder and the possible penalty is death.

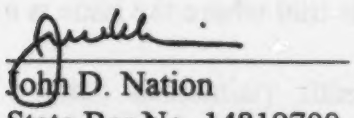
See also Canizio v. New York, 327 U.S. 82 (1946) (right to counsel case) (Justice Murphy, dissenting, states that admission of withdrawn pleas is of doubtful constitutionality).

Despite the presence of Rule 410, it is a violation of due process and the right against self-incrimination if a defendant makes incriminating statements in the course of negotiating or entering a plea and has those statements later admitted against him if the plea fails. Just as troublesome is when a defendant refuses a plea bargain

offer and, as here, finds this refusal being used against him as evidence for more severe punishment.

Petitioner urges this Court to grant certiorari in this case and hold that there is a constitutional dimension Federal rule 410 and its state counterparts and that a state may not constitutionally present evidence of a defendant's response to a plea bargain offer against him.

Respectfully submitted,



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COUNSEL OF RECORD

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-95-00050-CR

MARK ANTHONY GONZABA
V.
THE STATE OF TEXAS

On Appeal from the Criminal District Court No. 1
Dallas County, Texas
Trial Court No. F94-01404-LH

Before Cornelius, C.J., Bleil and Grant, JJ.
Opinion by Justice Grant

OPINION

Mark Anthony Gonzaba appeals from a conviction on three counts of delivery of a controlled substance, cocaine, for which he was sentenced to five years' confinement. Gonzaba appeals the ruling on two objections made at trial: one regarding a cross-examination question directed at the defendant concerning his declining to participate in the police investigation of his supplier, and one regarding a statement made by the prosecutor during closing argument accusing Gonzaba of threatening a witness.

David Eldridge, a Sergeant Investigator with the Texas Department of Public Safety, was investigating cocaine trafficking in Dallas County in June of 1993, working with Robert Englund, a confidential informant. Englund had previously been arrested by Eldridge for cocaine trafficking and had agreed to provide information on his supplier. Eldridge's goal in the investigation was to start with a "street level" dealer,[1] have him or her participate in the investigation, and eventually investigate the street level dealer's supplier.[2]

Englund introduced Eldgridge to Gonzaba on June 17, 1993, and the two made cocaine purchases from Gonzaba on June 17, 1993, July 29, 1993 and August 4, 1993. After the first two purchases, Eldridge determined that Gonzaba would not lead him to Gonzaba's source. After the last purchase, Gonzaba was arrested for delivery of a controlled substance. After the arrest, Eldridge asked Gonzaba to participate in the investigation[3] and Gonzaba

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[1] Eldridge described a "street level" dealer as being one who is "dealing ounces" and "is capable of dealing multi-ounces."

[2] Eldridge described the "street level" dealer's supplier as an "upper level" dealer who deals in "kilograms of cocaine."

[3] Gonzaba testified that after Eldridge arrested and handcuffed him, Eldridge asked him if he wanted to help him investigate Gonzaba's

refused. Gonzaba was then convicted of these crimes and sentenced to five years' confinement.

By his first point of error, Gonzaba argues that, during his punishment hearing, the trial court erred in permitting the prosecution to cross-examine him concerning whether he had agreed to cooperate with Sergeant Eldridge in his investigation of Gonzaba's supplier. The only argument Gonzaba proffers in support of this point of error relies upon Texas Rule of Criminal Evidence 410 (3). Thus, we do not address whether being forced to answer such a question would be tantamount to a forced admission of guilt and could not be used against him.[4]

The State responds by arguing Gonzaba failed to preserve this point for appellate review because his objections at trial do not comport with his argument on appeal. Grounds of error urged on appeal must comport to objections made at trial or error is not

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supplier. ("Have you ever seen cops, tag, you're it, who do you want to turn?") Eldridge also testified that he contacted Gonzaba about cooperating in the investigation both at the scene of Gonzaba's arrest and later, through Gonzaba's attorney.

[4] A request to cooperate by revealing his supplier is inconsistent with Gonzaba's plea of not guilty and was thus inadmissible because it placed him in the position of having to incriminate

preserved. *Burks v. State*, 876 S.W.2d 877, 908 (Tex. Crim. App. 1994), *cert. denied*, __ U.S. ___, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995); *Butler v. State*, 872 S.W.2d 277, 236 (Tex. Crim. App. 1994), *cert. denied*, __ U.S. ___, 115 S.Ct. 1115, 130 L.Ed.2d 1079 (1995), *Tasby v. State*, 679 S.W.2d 78, 79 (Tex. App.—Texarkana 1984, no pet.).

At trial Gonzaba objected to this questioning because any post-arrest statements by Gonzaba were not reduced to writing. On appeal, however, Gonzaba argues that this evidence concerned a statement made in the course of a plea discussion. Because this objection does not comport with Gonzaba's trial objection, he did not adequately preserve this point for appellate review. Accordingly, this point of error is overruled.

Gonzaba next argues that the trial court erred in overruling his objection to the prosecution's statement during closing argument accusing him of threatening a witness. The State argued that

> [Gonzaba] gets up here and makes that absolutely irresponsible

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himself or be accused of not cooperating. Gonzaba did not object, however, on that basis.

> statement that drugs were a way of life in Oak Cliff. Did you all hear that? Did you hear that when he said that? That should have enraged you. Why? It may be a way of life in his world, in his sick, demented world where he deals drugs five or six years of his life, or he uses drugs five or six years of his life; where he refuses to cooperate with the police, *when he threatens Cis—*

(emphasis added).

Gonzaba contends that the statement about him threatening confidential informants was improper because it was outside the record. Proper jury argument includes:

- summation of the evidence
- reasonable deduction from the evidence
- answer to argument of opposing counsel; and
- plea for law enforcement.

Todd v. State, 598 S.W.2d 286, 296-297 (Tex. Crim. App. [Panel Op.] 1980); *Dunbar v. State*, 551 S.W.2d 382, 384 (Tex. Crim. App. 1977); *Alejandro v. State*, 493 S.W.2d 203, 213 (Tex. Crim. App. 1973). Remarks of counsel during final argument must be considered in the context in which they appear. *Gaddis* v. State, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988); *Denison v. State*, 651 S.W.2d 754, 761 (Tex. Crim. App. 1983). Counsel are allowed wide in drawing inferences from the evidence, provided those inferences are reasonable, fair, legitimate and offered in good faith. *Gaddis*, 753 S.W.2d at 399. Such inferences must be based upon

what the jury heard and observed in the courtroom. *Vaughn v. State*, 607 S.W.2d 914, 923 (Tex. Crim. App. 1980). References to facts that are not in evidence and are not inferable from the evidence in the record, however, is improper. *Cannon v. State*, 668 S.W.2d 401, 405 (Tex. Crim. App. 1984); *Alejandro*, 493 S.W.2d at 231; *see also Johnson v. State*, 698 S.W.2d 154, 166-67 (Tex. Crim. App. 1985); *Vaughn*, 607 S.W.2d at 922-923.

Even when a party's counsel makes an impermissible jury argument, it is not reversible "unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute or injects new facts, harmful to the accused into the trial proceeding." *Todd*, 598 S.W.2d at 297; *see also Kinnamon v. State*, 791 S.W.2d 84, 89 (Tex. Crim. App. 1990); *Gaddis*, 753 S.W.2d at 398; *Brandley v. State*, 691 S.W.2d 699, 712-713 (Tex. Crim. App. 1985).

In the present case, Gonzaba contends that the statement about him threatening confidential informants was improper because it was outside the record. The State responds by first arguing that Gonzaba did not properly preserve this point because his objection at trial differed from that on review. As stated above,

grounds of error urged on appeal must comport to objections made at trial or error is not preserved. *Burks*, 876 S.W.2d at 908; *Butler*, 872 S.W.2d at 236.

At trial, Gonzaba objected on the ground that this argument "would get into an area of plea negotiation or an attempt at compromise and settlement of the case by an agency of the government." On appeal, Gonzaba asserts that this argument was outside of the evidence presented at trial. In the interest of justice, however, we will address Gonzaba's contentions as if properly preserved. *See Burks*, 876 S.W.2d at 908; *Butler*, 872 S.W.2d at 236.

Gonzaba argues that the State's statement that he threatened confidential informants is outside of the record. The trial court sustained a hearsay objection when Englund asserted that he had learned through friends that Gonzaba and his associates were after him. There was evidence, however, that Englund moved to get away from Gonzaba. There was also evidence that Gonzaba had followed Englun on several occasions, even after Englund had moved. Additionally, there was evidence before the jury that the informant felt threatened by Gonzaba and that Englund "feared for

[his] life." The argument that Gonzaba had threatened the confidential informant is a reasonable deduction from facts properly before the jury. It was, therefore, a permissible jury argument. This point of error is overruled.

The judgment of the trial court is affirmed.

/s/
Ben Z. Grant
Justice

Date Submitted: October 16, 1995
Date Decided: February 16, 1996

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OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

August 28, 1996

COA# 06-95-00050-CR

RE: Case No. 0731-96

STYLE: GONZABA, MARK ANTHONY

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk